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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1131

THE FRANKLIN LIFE INSURANCE COMPANY,
an Illinois corporation,
Petitioner and Plaintiff,
v.
WILLIAM J. CHAMPION AND COMPANY,
a Michigan corporation,
Respondent and Defendant.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE MICHIGAN PHYSICIAN-PATIENT PRIVILEGED COMMUNICATION STATUTE DID NOT DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHT

In its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth

Circuit in the above entitled action, Petitioner claims that it was prevented at the trial of the case from introducing certain "testimony," which Petitioner claims would have helped its case, because Respondent invoked *Michigan Statutes Annotated,* Section 27A.2157, thereby preventing the admitting physician from "testifying" to what the insured told him when the insured was admitted to a hospital. Petitioner says that this statute, and other similar statutes which create a privileged communication between physician and patient, is fundamentally unfair and contrary to traditional notions of fair play. Therefore, it claims Petitioner's constitutional rights were violated contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. We shall consider subsequently the nature of the alleged "testimony" so excluded, but first we shall address ourselves to Petitioner's argument that it was deprived of its constitutional rights by this statute.

Physician-patient privileged communication statutes have been adopted in 32 states, including all or substantially all, of the principal industrial and commercial states of this country. See Appendix "B" to the petition for writ of certiorari. If Petitioner is correct in its contention, then all of these statutes must fall. It follows logically that all other exclusionary rules, whether statutory or common law, which create privileged communications must likewise fall as unconstitutional. Therefore, if Petitioner's position is sustained, we will see the end, on constitutional grounds, of the attorney-client privilege, the priest-penitent privilege, and the privilege of one spouse not to testify against another. The thousands of decisions, both federal and state, construing and applying such statutes and rules will all be swept away. Indeed, if, as Petitioner contends a litigant has a constitutional right to bring before the trier of

the facts all evidence which might be helpful to his case, what will become of even such old standbys as the hearsay rule? All exclusionary rules of evidence necessarily keep out something which, on the basis of fairness, might perhaps ought to be heard in order to arrive at the truth of the matter. If Petitioner prevails, it will certainly simplify the law of evidence.

There would seem to be no doubt as to the constitutionality of the Michigan physician-patient privileged communication statute. It is a rule of evidence, and rules of evidence, being procedural in their nature, are peculiarly discretionary with the law-making authority. *Salsburg v. State of Maryland,* 346 U.S. 545, 98 L. Ed. 281 (1954). So far as the Federal Constitution is concerned, it "is within the acknowledged power of every legislature to prescribe the evidence which shall be received * * * in the courts of its own government." *Fong Yue Ting v. U.S.,* 149 U.S. 698, 729, 37 L. Ed. 905, 918 (1893). Privileged communications statutes have been attacked before on constitutional grounds and have been uniformly upheld. In *Cady v. State,* 198 Ga. 99, 31 S.E. (2d) 38 (1944), a Georgia statute declaring husband and wife incompetent to testify for or against each other in a criminal proceeding was held not invalid as unreasonable or contrary to public policy nor as violating the due process of law or equal protection of law clauses of the state constitution and of the Fourteenth Amendment. This Court denied certiorari. 323 U.S. 676, 89 L. Ed. 549. See also *Melton v. State,* 180 Ga. 104, 178 S.E. 447 (1935), upholding the same statute against constitutional attack. In *Ex parte Sparrow,* 14, F.R.D. 351 (D.C. Ala., 1953), an Alabama statute granting a privilege against disclosure of the sources of information, obtained by a newspaper employee and published in a newspaper, was held not to be unconstitutional in violation of the Fourteenth Amendment.

Petitioner's claim is simply that the Michigan physician-patient privileged communication statute is unfair because it kept out of evidence some "testimony" which Petitioner says would have helped its case. Petitioner does not even claim that the statute is discriminatory as against it, and it is obvious that no such claim could be made because the statute applies equally with respect to all litigants and in all kinds of cases. Even assuming, which we do not admit, that the application of the Michigan statute worked a hardship on Petitioner in this particular case, the fact that a rule of law may in certain instances work a hardship does not violate due process of law, provided it operates without any discrimination and in like manner against all persons of a class. *People's Wayne County Bank v. Wolverine Box Company,* 250 Mich. 273, 230 N.W. 170 (1930). In innumerable cases in the normal course of litigation, absence of or inability to secure witnesses may render the presentation of a complete defense impossible. Rules of evidence and procedure may work a hardship under certain circumstances, but that fact alone does not render them unconstitutional if they further justice in the general course of their operation. *People's Wayne County Bank v. Wolverine Box Company, supra.*

The remainder of Petitioner's argument consists of an attack on the physician-patient privilege on the ground that it does not accomplish the purpose for which it is designed and is unnecessary. In support of this argument it cites a dissenting opinion of a Wisconsin judge and several articles by text writers. "These are considerations that may very properly be addressed to the legislature, but not to the judiciary—they go to the expediency of the law, and not to its constitutionality." *Sears v. Cottrell,* 5 Mich. 251, at 254 (1858).

IF PETITIONER IS CORRECT IN ITS CONTENTION THAT ITS CONSTITUTIONAL RIGHTS WERE VIOLATED BY EXCLUDING THE EVIDENCE IN QUESTION, THEN, ON THE SAME REASONING, RESPONDENT WOULD HAVE BEEN DEPRIVED OF ITS CONSTITUTIONAL RIGHTS IF SAME HAD BEEN RECEIVED

What is this "testimony" which Petitioner claims it was entitled, as a matter of constitutional right, to have admitted into evidence? For one who bases its claim on "fairness and traditional notions of fair play," it would seem that Petitioner has been less than candid with this Court in saying (page 7 of petition for writ of certiorari) that "before Dr. Stanton could testify to these material facts" his testimony was objected to and did not become evidence of record. The fact is, however, that Dr. Stanton was not prevented from "testifying" to anything. He had no personal knowledge, did not recall the admission of Mr. Champion to St. John Hospital, and his recollection was not refreshed by a reading of his admitting notes. (R. 186a-187a) This being the case, Petitioner then tried to introduce into evidence the doctor's admitting notes, on the theory that same constituted past recollection recorded and was therefore an exception to the hearsay rule. They were objected to and excluded on the basis of the Michigan privileged communication statute, but the trial court accepted an offer of proof of such notes. (R. 25b-26b) So if Petitioner should prevail in its contentions, and this Court were to strike down the Michigan privileged communication statute, there would then be received into evidence the notes taken by the doctor of what the insured supposedly told him when the insured, seriously ill at the time and deceased when the

case was tried, was admitted to a hospital. There would be no possibility of cross-examination, no way to test the accuracy of the doctor's recording of what the insured told him, no way of knowing whether the doctor recorded everything he was told, no means of telling if the insured even knew what he was saying (he was removed to another hospital two days later in a semi-conscious condition, R. 67a), and no way of knowing anything more about the incident than what the cold, written page discloses. Is this fair? Could not Respondent make the same argument that Petitioner does, namely, that to receive evidence without the opportunity of testing it by cross-examination is fundamentally unfair, contrary to traditional notions of fair play, and deprives Respondent of its rights under the due process and equal protection clauses of the Fourteenth Amendment? If the Michigan physician-patient privileged communication statute is unconstitutional because unfair, then is not this exception to the hearsay rule, which permits a memorandum to be received in evidence about which the author thereof has no recollection and with respect to which he cannot be cross-examined, equally unfair and therefore unconstitutional?

We disregard entirely Petitioner's claim with respect to what Dr. Barsch would have testified to. Petitioner admits (page 7 of petition for writ of certiorari) that Dr. Barsch's testimony would have been merely cumulative to that of Dr. Stanton, and for that reason no offer of proof was made by Petitioner. Also, since no offer of proof was made, we do not know, on this record, what Dr. Barsch would have testified to, if anything, Petitioner's citation to R. 360a being merely Petitioner's counsel's unsupported affidavit made in connection with Petitioner's motion for a new trial.

EVEN IF THE EVIDENCE WHICH WAS EXCLUDED BY THE MICHIGAN PHYSICIAN-PATIENT PRIVILEGED COMMUNICATION STATUTE HAD BEEN RECEIVED, IT COULD NOT HAVE CHANGED THE RESULT

As far as the Dr. Stanton memorandum is concerned, it contained nothing which could have changed the outcome of the case. All that Dr. Stanton's memorandum said, in substance, is that the insured had developed headaches some five weeks before, that he had visual difficulties, that he experienced dizziness and some nausea and vomiting, and also that he had some difficulty walking. There was abundant evidence at the trial that Mr. Champion had suffered from recurrent headaches and visual difficulties for some months, but he attributed such headaches to an allergy, which opinion was confirmed by medical advice that he received, and the visual difficulties he attributed to new bifocal glasses. (Finding of Fact No. 7; R. 347a-348a) There was also testimony that Mr. Champion had trouble walking as the result of a heel injury suffered from a fall from a ladder. (R. 323a)

None of these facts was disputed by Respondent, and, therefore, even if the excluded "testimony" had been received, it certainly would not, contrary to Petitioner's claim, have been "convincing evidence that Mr. Champion must have known that his condition was not normal and that his general state of health was different than it had been in the past." It could never have overcome the overwhelming testimony, elicited from witnesses from both sides, which established beyond doubt that during the critical period from the date of the reinstatement application until its approval, the insured was the sole owner and

manager of a small real estate brokerage company (R. 37a); was a vigorous, apparently healthy man, who did not miss a single day from his work on account of illness until August 31, 1960 when he went home with a severe headache (R. 150a, 152a, 283a, 322a 75b, 45a); that he was an ardent swimmer and swam virtually daily during the summer of 1960 (R. 93a, 293a, 304a, 316a) and one afternoon swam 70 lengths of an Olympic-size swimming pool (R.317a); that he alone cared for the extensive grounds surrounding his home and did all his own gardening (R. 92a, 93a, 268a, 269a, 292a); that he painted the entire rear of his large house (R. 90a, 270a); that he played games which required alertness, agility and good vision (R. 294a, 295a); that he washed his automobile and played tetherball and badminton (R. 293a, 55b, 94a, 304a, 305a); that he conducted sales meetings every week and discussed with his staff numerous matters relating to his real estate business (R. 88a, 89a, 276a, 277a, 284a, 327a) and handled all advertising for his business (R. 4b); that he appraised properties, listed properties for sale, attended real estate closings, and supervised the activities of 15 sales people (R. 87a, 276a, 283a, 322a, 4b); that he carried on his business correspondence in his usual manner (R. 312a, 313a, 16b); wrote many checks (R. 311a); attended church regularly and participated in a drive to raise funds for his church (R. 94a); engaged in his usual social activities (R. 93a); kept no medication in his office (R. 154a, 314a, 323a, 76b); and that on the week end immediately preceding his alleged statement to Dr. Stanton he attended a wedding and subsequent wedding reception at which he danced and mingled with the guests (R. 95a, 310a, 311a) and on the next day participated in a swimming meet which he won for his team by swimming a very fast anchor leg (R. 95a-97a, 293a, 318a, 65b-66b). On this occasion he posed for a photograph

with his family, which is Defendant's Exhibit B, R. 81b. As the Court of Appeals stated in its opinion (350 F. (2d) 115 at 119), "In this photograph, he is erect, smiling, and the picture and personification of vigor and good health."

Therefore, even if Petitioner's position on the constitutional issue had merit as an abstract proposition, this is not the proper case in which to consider such issue because, even if the excluded evidence had been received, it could have made no difference in the final outcome.

CONCLUSION

This case has been in active litigation for five years. Petitioner has had the benefit of extensive discovery and pretrial proceedings, a lengthy trial, motions after trial including motion for new trial, an appeal to the United States Court of Appeals for the Sixth Circuit, and a motion for re-hearing by that Court. Now it has applied to the court of last resort, seeking to raise a specious constitutional issue. We submit that this is a shocking example of a litigant's taking every advantage of the disparity in economic resources between the parties (in this case, a wealthy and powerful insurance company on the one hand and the insured's widow and eight children who, as the owners of Respondent, are the real parties in interest, on the other hand), and attempting to wear down its opponent by endless delay.

We pray that this groundless petition for writ of certiorari be summarily denied, and that Petitioner be heavily

mulcted in damages and costs pursuant to Rule 56(4) and Rule 57(7) of the Rules of this Court.

Respectfully submitted,

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April 12, 1966.